



Agenda Date: 1/23/02

Agenda Item: 3A

STATE OF NEW JERSEY

Board of Public Utilities

Two Gateway Center

Newark, NJ 07102

IN THE MATTER OF A REQUEST BY)
COMCAST CABLEVISION CORPORATION,)
VARIOUS COMCAST NEW JERSEY)
CABLE TELEVISION SUBSIDIARIES AND)
COMCAST BUSINESS COMMUNICATIONS,)
INC., TO ALLOW COMCAST BUSINESS)
COMMUNICATIONS, INC., TO UTILIZE A)
PORTION OF ITS NEW JERSEY)
AFFILIATES CABLE FACILITIES IN THE)
PROVISION OF LOCAL AND)
INTEREXCHANGE)
TELECOMMUNICATIONS SERVICES IN)
THE STATE OF NEW JERSEY)

CABLE TELEVISION

INTERIM ORDER OF APPROVAL

BPU DOCKET NO. CO01100699

(SERVICE LIST ATTACHED)

BY THE BOARD:

This matter considers a request by Comcast Cablevision Corporation ("Comcast"), various Comcast New Jersey cable television subsidiaries¹ and Comcast Business Communications, Inc. ("CBC")² to allow CBC to use a portion of its New Jersey cable television affiliates fiber optic backbone facilities to begin offering and providing competitive local and inter-exchange telecommunications services. CBC predicates its request on a similar approval, granted by interim order, to Cablevision Lightpath, Inc. ("Lightpath") in Docket No. C098091001 (See I/M/Q The Petition of Cablevision of New Jersey, Inc., CSC TKR, Inc., Cablevision of Oakland, Inc., Cablevision of Paterson, Inc., Cablevision of Rockland/Ramapo, Inc., Cablevision of Warwick,

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Comcast Cablevision of Avalon, Inc., Comcast Cablevision of Burlington County, Inc., Comcast Cablevision of Central New Jersey, Inc., Comcast Cablevision of Garden State, L.P., Comcast Cablevision of Gloucester County, Inc., Comcast Cablevision of Hopewell Valley, Inc., Comcast Cablevision of Jersey City, Inc., Comcast Cablevision of Lawrence, Inc., Comcast Cablevision of Long Beach Island, LLC, Comcast Cablevision of Mercer County, Inc., Comcast Cablevision of Monmouth County, Inc., Comcast Cablevision of New Jersey, Inc., Comcast Cablevision of New Jersey, LLC, Comcast Cablevision of Northwest New Jersey, Inc., Comcast Cablevision of Ocean County, Inc., Comcast Cablevision of Plainfield, Inc., Comcast Cablevision of South Jersey, Inc., Comcast Cablevision of Southeast Pennsylvania, Inc., and Comcast Cablevision of Wildwood, Inc.

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CBC is an indirect wholly owned subsidiary of Comcast Corporation, which also indirectly owns certain subsidiaries that operate cable television systems that provide cable services to approximately 54% of cable customers in New Jersey.

Inc., Cablevision of Hudson County, Inc., Cablevision of Monmouth, Inc., and Cablevision of Newark for Regulatory Approvals, Docket No. C098091001, November 23, 1998).³

Background and Discussion

Background

By Order dated February 15, 2001, the Board granted CBC, formerly Comcast Telecommunications Inc. ("CTI"), authority to provide local exchange and inter-exchange telecommunications services throughout the State of New Jersey. However, since CBC in response to Staff discovery, indicated its plan to use the facilities of its New Jersey cable television affiliates in the provision of facilities based telecommunications services, and its cable affiliates had not provided a lease agreement as required under N.J.S.A. 48:5A-40 and 41 to indicate how CBC would pay for the use of such facilities, the Board recognized a potential for cross-subsidy. In order to guard against the potential that the cost of CBC's venture may be borne by cable rates, or when financing is used, involve the negative pledge of cable affiliate assets, the Board set certain conditions on CBC's operating authority. Those conditions require, among other things, that CBC's cable television affiliates file sufficient information at least 90 days prior to the provision of any telecommunications service over its facilities to clearly demonstrate that there is no cross subsidy arising from CBC's potential use of its facilities. CBC's cable affiliates are further required to keep records of all construction, repair and maintenance costs associated with the use of cable facilities for telephony purposes, and keep its books and records in a manner that all costs, charges, interest income, accounting entries and associated matters, including construction, operating and maintenance costs, regarding use of cable facilities for telephony purposes can be readily obtained and/or determined. See Order of Approval, I/M/O the Petition for an Order Authorizing Comcast Business Communications, Inc., to Provide Local Exchange and Interexchange Telecommunications Services, BPU Docket No. TE00100789 (February 15, 2001).

On August 8, 2001, the Board approved a tariff for CBC to provide intrastate local exchange services throughout New Jersey. See Order of Approval, I/M/O a Filing by Comcast Business Communications, Inc., Requesting Approval of its B.P.U.-N.J.- No. 1 Tariff to Provide Local Exchange Services Within the State of New Jersey, BPU Docket No. TT01040207 (August 8, 2001).

Discussion

By letter dated April 3, 2001 and addressed to Board Secretary Frances L. Smith, CBC, requested the authority, like Lightpath, to use a limited amount of its New Jersey cable television affiliate's facilities, citing the terms of Lightpath interim Order as support. However, since CBC's request merely cited to the Lightpath Order, and failed to provide certain specifics

regarding the fiber and other facilities that it intended to use, and proof that its use of same

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The above noted Cablevision cable television subsidiaries sought and received temporary approval on an interim basis under N.J.S.A. 48:5A-40 and 41 to permit their affiliate, Cablevision Lightpath-NJ, Inc. to use up to 16 megahertz ("MHz") of their total coaxial facility bandwidth of 750 MHz along with less than 5% of their fiber backbone facilities over any fiber route to provide facilities based local and inter-exchange telecommunications services. The Order requires Cablevision to return to the Board for additional approval, before it may expand its usage of cable facilities for telecommunications purposes. The Board, further notes, that its approval is interim in nature since there are remaining issues concerning potential cross subsidy and possible additional limitations of Cablevision's use of fiber facilities which require further review.

would not exceed the interim level approved for Lightpath, staff requested additional, specific information.⁴

Thereafter, by letters dated July 25, 2001 and September 18, 2001, CBC filed information indicating the general location of the fiber facilities it had intention to use, as well as more specifically addressing CBC's proposed use of the facilities, and how it satisfied the threshold set in the Lightpath Order. However, unlike Lightpath, CBC included a representation that it does not anticipate using local cable plant in its operations. Rather, such facilities will be constructed by CBC, if needed. According to Staff, limiting its use of affiliate facilities to the fiber backbone lessens the level of potential cross subsidization between CBC and its affiliates.

Finally, on November 20, 2001, in response to a finding by the Attorney's General Office that Comcast's New Jersey cable television affiliates were the proper entities to petition the Board to allow CBC to use their facilities, Comcast and its New Jersey cable television subsidiaries noted above filed a letter in lieu of petition with Acting Board Secretary Henry M. Ogden, joining CBC in its request.

Cross Subsidization

Use of the facilities of New Jersey cable television company's facilities by other entities, whether or not they are affiliates of the cable company, for other purposes not incidental to the provision of cable television service, such as in the instant case, to offer facilities based telecommunications services without a lease agreement as required under N.J.S.A. 48:5A-40 and 41 presents a potential for cross-subsidy. Since the underlying facilities have been constructed through the use of revenues derived from cable television rates, and possibly through financing involving a negative pledge on cable system assets, their use by other entities for non-traditional cable services, such as telecommunications services, without a corresponding payment by that entity for the value of the facilities used, represents a de facto cross subsidization of those non-cable operations.

Generally speaking, such cross subsidization is contrary to the provisions of the Telecommunications Act of 1996 ("1996 Act"). While the 1996 Act does not specifically address cross subsidy by a cable television operator, the Board opines that the cross subsidy prohibitions directed at telecommunications companies in Section 254 (k) and the provision that all State regulations regarding competitive market entry and use of public rights-of-way be applied on a competitively neutral basis require the Board to prohibit cross subsidization by other providers of telecommunications services (e.g., cable television or electric companies, their subsidiaries or affiliated companies). To do otherwise would require the Board to permit similar cross subsidization by all providers of telecommunications and video services.

Under the terms of the 1996 Act, states may not prohibit the ability of any entity to provide interstate or intrastate telecommunications services (Sec. 253 (a)). States may, however, impose competitively neutral requirements necessary to preserve universal service, protect

public safety, ensure service quality, and safeguard consumer rights (Sec. 253 (b)). States and/or local governments may also manage the public rights-of-way on a competitively neutral

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Lightpath was required to provide Board Staff with specific information regarding the specific fiber routes and areas where the facilities of its cable television affiliates were located, as well as demonstrating that it would not exceed the limited usage ceiling proposed, i.e., less than 5% of fiber backbone facilities and no more than 16 MHz of coaxial facility bandwidth.

and non-discriminatory basis (Sec. 253 (c)). Telecommunications carriers may not use services that are not competitive to subsidize services that are subject to competition (Sec. 254 (k)).

Due to the overall tenor of the 1996 Act and its requirements that states act in a competitively neutral and non-discriminatory manner, the Board believes that the prohibitions on cross subsidization extend to telecommunications carriers or others, such as cable television or electric companies providing telecommunications services. The conference agreement for Section 253(b) supports Staff's position. In pertinent part, it states:

"New section 253(b) clarifies that nothing in this section shall affect the ability of a State to safeguard the rights of consumers. In addition to consumers of telecommunications services, the conferees intend that this includes the consumers of electric, gas, water or steam utilities, to the extent such utilities choose to provide telecommunications services. Existing State laws or regulations that reasonably condition telecommunications activities of a monopoly utility and are designed to protect captive ratepayers from the potential harms caused by such activities are not preempted under this section."

Although cable television companies are not specifically mentioned here, the intent to prevent harm to captive ratepayers is clear.

Lightpath Decision

On September 11, 1998, Cablevision of New Jersey, Inc., CSC TKR, Inc., Cablevision of Oakland, Inc., Cablevision of Paterson, Inc., Cablevision of Rockland/Ramapo, Inc., Cablevision of Warwick Inc., Cablevision of Hudson County, Inc., Cablevision of Monmouth, Inc., and Cablevision of Newark filed a request pursuant to N.J.S.A. 48:5A-40 and 41 for approval to permit their affiliate, Lightpath, to utilize their respective cable network facilities to provide facilities based local and interexchange telecommunications services.

On March 26, 1998, the Board in Docket No. TE97120883, issued an Order granting Lightpath authority to provide local and interexchange telecommunications services in New Jersey, subject to the approval of a tariff and interconnection agreement. The March 26, 1998 Order further required that prior to Lightpath's use of facilities owned, operated or controlled by its cable television affiliates, that such affiliates file an appropriate petition and obtain prior Board approval pursuant to N.J.S.A. 48:5A-40 and 41. The Order further required that an appropriate notice of Lightpath's intended usage be given to each affected municipality in order to provide them with information which may be needed in accordance with rights they may have under N.J.S.A. 48:5A-30(c), proof of which was to be filed with the Board at least 60 days prior to the provision of telecommunications service.

Throughout several discussions with representatives of Lightpath and its parent company, Cablevision Systems Corporation, and through various documents, it had been represented that Lightpath's usage of its various cable affiliate's facilities would be de minimis and pose no adverse affect to the underlying cable television service. It had been identified that in

providing its services, Lightpath would require approximately 16 megahertz (MHz) of its various cable affiliate's total coaxial facility bandwidth of 750 MHz along with a negligible amount of fiber

backbone facilities, typically less than 5% of any fibers over any fiber route.

After review of the salient information in the record, Staff found that Lightpath's proposed usage of 16 MHz of its various cable affiliate's coaxial bandwidth facilities would not adversely impact the affiliates' ability to provide safe, adequate and proper cable television service, and recommended that Lightpath or any other telecommunications provider be permitted to use up to 16 MHz of coaxial facility bandwidth, and less than 5% of fiber backbone facilities on an interim basis to service all customers. Staff further recommended that the remaining issues of possible cross subsidy and possible limitations on the usage of fiber backbone facilities be deferred to other dockets or a further Order in that matter. Thereafter, by Order dated November 23, 1998, the Board granted interim approval of the proposed usage of cable facilities by Lightpath, subject to certain recordkeeping and cross subsidization conditions. (See I/M/O The Petition of Cablevision of New Jersey, Inc., CSC TKR, Inc., Cablevision of Oakland, Inc., Cablevision of Paterson, Inc., Cablevision of Rockland/Ramapo, Inc., Cablevision of Warwick, Inc., Cablevision of Hudson County, Inc., Cablevision of Monmouth, Inc., and Cablevision of Newark for Regulatory Approvals, Docket No. C098091001, November 23, 1998).

Lease, Encumbrance, Disposition of Property

Comcast, its New Jersey cable television subsidiaries and CBC argue that because no formal agreement exists between CBC and its New Jersey cable television affiliates for the use of their cable facilities, said affiliates have not sold, leased, mortgaged or otherwise disposed or encumbered their property by virtue of CBC's use of same. Therefore, they argue that no Board approval is required under N.J.S.A. 48:5A-40. They further argue that by its explicit terms N.J.S.A. 48:5A-40 contains an exception from the need for Board approval where the sale, lease or other disposition by a CATV company of any of its property is in the ordinary course of business. Finally, Comcast, its New Jersey cable television subsidiaries and CBC argue that N.J.S.A. 48:5A-41 is not implicated by CBC's use of the cable facilities, since the cable operators are not loaning any money or property to CBC.

Comcast, its New Jersey cable television subsidiaries and CBC's reliance on the lack of a formal agreement between the cable television operators and CBC concerning CBC's use of cable facilities as a basis for obviating Board approval is misplaced. There is no argument that CBC will be using facilities owned by its New Jersey cable television affiliates in the provision of its telecommunications services, nor that it intends to do so without compensating its affiliates for such use. However, what is at issue is whether CBC's use gives rise to a loan, encumbrance, or other disposition of property that would require prior Board approval under N.J.S.A. 48:5A-40 and N.J.S.A. 48:5A-41. The Board believes that it does. Neither the absence of a formal agreement, nor the lack of payment by CBC for its use of cable facilities, changes the fact that the use of cable facilities by a third party, even an affiliate, constitutes a loan or other disposition of the facilities. To the extent that CBC makes use of its cable affiliates facilities or they are reserved for its sole use, a disposition of value and control has taken place. The cable affiliates in this instance either have or will soon relinquish their use of any and all facilities occupied by CBC for the provision of cable television services. At best, this constitutes a permissive use or loan of the facilities. In any event there is a transfer of use, benefit and

value between CBC and its cable affiliates for which the cable affiliates will receive no compensation. Therefore, the requirements of N.J.S.A. 48:5A-40 and/or N.J.S.A. 48:5A-41 clearly apply.

Ordinary Course of Business

Similarly, Comcast, its New Jersey cable television subsidiaries and CBC argue that since CBC is an indirect subsidiary of Comcast, CBC's use of its cable affiliates' cable television plant is in the ordinary course of business. We disagree. In order for Comcast or CBC to support a contention that CBC's use of its cable affiliates' cable television plant is an ordinary course of business transaction, it would need to show that CBC's use of the cable television plant is a matter of normal and incidental daily custom and practice of the business of its cable affiliates. CBC cannot reasonably support that its use of its cable affiliates' cable television plant to provide its own telecommunications business is normal incidental custom or practice for its cable affiliates or any other cable television operator. Further, in order to support a contention that CBC's use of its cable affiliates' cable television plant is an ordinary course of business transaction, it would need to show that the plant used by CBC was no longer used and useful for the provision of the affiliates cable television services. Such a showing would, by necessity, require a demonstration that the plant was obsolete or in some other way no longer applicable for cable television services. Inasmuch as the facilities in question are fiber optic cable backbone facilities, such a demonstration cannot be made. Consequently, the Board finds no basis to support a finding that CBC's use of its cable affiliates facilities is in the ordinary course of business.

The pivotal issue here, notwithstanding the issues of facility encumbrance and cross subsidization, is whether CBC's proposed usage of its affiliates cable television facilities meets the interim usage standard established in the Lightpath Order. CBC's representations as expressed in counsel's September 18, 2001 letter clearly indicates that it does. Therefore, under the reasonable and non-discriminatory provisions of the 1996 Act, the Board, must afford to CBC the same interim approval granted to Lightpath, at least in terms of fiber backbone facility usage, until such time as the general issues and their impact on regulated subscribers can further examined. However, based on CBC counsel's representations, the Board need not address CBC's potential use of local cable system bandwidth, since, by its own admission, it would construct any such plant that may be required.

After review, the Board FINDS that CBC's proposed use of its New Jersey cable television affiliates fiber backbone facilities, with the usage limitation proposed and originally set forth in the Lightpath Order, will not have an immediate adverse impact on the cable television affiliates' ability to provide safe, adequate and proper cable television service and that interim approval according to the terms of the Lightpath Order is warranted. Therefore, the Board HEREBY APPROVES, on an interim basis, and in accordance with the conditions placed on Lightpath and its New Jersey cable television affiliates, CBC's use of its New Jersey cable television affiliates fiber backbone facilities for the provision of telephony services. As in our decision in the Lightpath matter, the Board's approval herein is necessarily interim because there are remaining issues regarding potential cross subsidy and possible additional limitations on the use of fiber backbone facilities that may be hereinafter warranted based on a later examination.

Similarly, like Lightpath, the approval granted herein will remain interim and the docket will remain open until such time as the Board issues an Order granting final approval, or issues a decision, as part of a generic proceeding, that substantially decides the issues.

Accordingly, the Board DIRECTS that total usage of CBC's New Jersey cable television affiliates fiber backbone facilities for the provision of telephony services by CBC or any other entity be at all times less than 5% of any fiber capacity over any given fiber backbone route, unless there is a further request in writing by CBC's New Jersey cable television affiliates to expand its usage, and Board review and approval is obtained relating thereto. In addition, this Order is subject to the following conditions:

1. Use of the cable television network for telephony purposes by CBC shall not lessen the obligations of its New Jersey cable television affiliates to their subscribers or impair their ability to provide safe, adequate and proper service.
2. CBC, its parent Comcast Corporation, and CBC's New Jersey cable television affiliates shall keep records of all construction, repair and maintenance costs associated with the use of New Jersey cable system facilities for telephony purposes.
3. Comcast Corporation, and CBC's New Jersey cable television affiliates shall keep records of the number of fiber cables in total and over any specific fiber route, by company, being used for telephony purposes.
4. In the event that Comcast Corporation or any of its New Jersey cable television subsidiaries elect to file a cost-of-service case, the Board and its staff reserves the right to review all proposed cost allocations and adjust them to the extent necessary to prevent or eliminate any cross-subsidization. The Board further reserves its continuing jurisdiction and authority, pursuant to N.J.S.A. 48:5A-9 and 48:2-13 and all other applicable laws, to investigate and audit or inquire, or to require the submission of any data by Comcast Corporation and/or its subsidiaries or affiliates as the Board or the Director of the Office of Cable Television, under the supervision of the Board may deem necessary in the future to ensure that no cross-subsidization occurs between the telephony and cable operations.
5. The approval to CBC, and Comcast Corporation's New Jersey cable television subsidiaries herein shall not constitute approval of any inter-company loan arrangement among or between Comcast Corporation and its affiliate's and related parties, nor eliminate the need for further Board review and approval if otherwise required under applicable law.

6. In the event that Comcast Corporation or CBC enters into an agreement with any other New Jersey cable operator or other entity either now or in the future subject to the competent jurisdiction of this Board, for the purpose of utilizing the cable operator or other entity's facilities for telecommunications purposes, the above conditions as well as those additional conditions stated in the Board's February 15, 2001 Order granting CBC its initial authority to provide telecommunications services in New Jersey shall apply to any such agreement. See Order of Approval, I/M/O the Petition for an Order Authorizing Comcast Business Communications, Inc., to Provide Local Exchange and Interexchange Telecommunications Services, BPU Docket No. TE00100789 (February 15, 2001).

DATED: January 23, 2002

BOARD OF PUBLIC UTILITIES
BY:

(signed)

FREDERICK F. BUTLER
ACTING PRESIDENT

(signed)

JEANNE M. FOX
PRESIDENT DESIGNEE

(signed)

CAROL J. MURPHY
COMMISSIONER

(signed)

CONNIE O. HUGHES
COMMISSIONER

ATTEST:

(signed)

HENRY M. OGDEN
ACTING BOARD SECRETARY

**I/M/O A REQUEST BY COMCAST BUSINESS COMMUNICATIONS, INC., TO
UTILIZE A PORTION OF ITS NEW JERSEY AFFILIATES CABLE FACILITIES
IN THE PROVISION OF LOCAL AND INTEREXCHANGE TELECOMMUNICATIONS
SERVICES IN THE STATE OF NEW JERSEY**

Docket No. CO01100699

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